Supreme Court, U.S.
FILED
06-505 OCT 5 - 2006
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

CARL J. MAYER, ESQ., ET AL., PETITIONERS

v.

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Carl J. Mayer
pro se
MAYER LAW GROUP
66 Witherspoon Street, Suite 414
Princeton, NJ 08542
609-921-0253

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 393-4141 ♦ USSCINFO.COM

Bruce Afran, Esq.
pro se
10 Braeburn Drive
Princeton, NJ 08540
(609)924-2075

Ted Rosenberg, Esq.
pro se
321 New Albany Road
P.O. Box 97
Moorestown, NJ 08057
(856)608-9999

John Gural
pro se
739 Parry Avenue
Palmyra, NJ 08065
(609)868-1303

QUESTIONS PRESENTED

Does the "presentment" clause of the Fifth Amendment to the United States Constitution secure the autonomy of a federal Grand Jury to investigate and bring criminal charges (independent of Executive Branch prosecutors and Judicial Branch judges) particularly in cases of criminal political corruption, thereby rendering unconstitutional the advisory committee notes to Rule 7 of the Federal Rules of Criminal Procedure?

Are citizens protected by the First, Fifth and Fourteenth Amendment to the United States Constitution in communicating evidence of crimes directly to federal Grand Juries, independent of prosecutors or judges?

Did the Framers of the Constitution intend to include the Grand Jury within the ambit of the Constitution's Separation of Powers scheme such that the Grand Jury remains autonomous of the Executive, Legislative and Judicial Branches and is always available, as it has been historically, to independently investigate evidence presented by citizens of criminal corruption by government officials of any branch of government?

PARTIES TO THE PROCEEDINGS

Petitioners

Carl J. Mayer, Esq.
Bruce Afran, Esq.
Ted Rosenberg, Esq.
John Gural

Respondent

United States

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The Court of Appeals for the Third Circuit issued no opinion and granted summary action in an order dated May 8, 2006. This order is reprinted in the Appendix To The Petition. ("App.")

The District Court's opinion is unpublished and is reprinted at App. 2a.

JURISDICTION

The Third Circuit Court of Appeals order granting summary action was entered on May 8, 2006.

The District Court's opinion was entered on January 3, 2006.

This Court has jurisdiction under 28 U.S.C. 1254(1)

RELEVANT PROVISIONS INVOLVED

(See Appendix)

STATEMENT

Petitioners submitted evidence of federal crimes related to political corruption before a federal judge and asked that he instruct a federal Grand Jury that it can consider the evidence independently of federal prosecutors and return a "presentment": an alternative to an indictment, specifically enumerated in the Fifth Amendment to the United States Constitution.

The judge refused and ruled that the advisory notes to the Federal Rules of Criminal Procedure declare presentments and Grand Jury autonomy obsolete. The

Third Circuit affirmed, and Petitioners now seek review of the fundamental constitutional questions raised.

Petitioners represent themselves *pro se* and *pro bono.* Petitioners neither expect nor shall they receive any remuneration for bringing this action, nor are they affiliated with any interest group or organization of any kind. They bring this Petition exclusively in the hopes of upholding the Constitution of the United States and, at long last, curbing corruption and illegality in High Office: a cancer that is eroding democracy and the rule of law in New Jersey and in the nation.

Petitioners are either members of the Bar or elected officials. They each have different political affiliations. Petitioner Carl J. Mayer, Esq. formerly served as an elected member of the Township Committee of Princeton, New Jersey. He was elected as an Independent. He is a former professor of law and clerked for Caleb M. Wright, United States District Court Judge. Petitioner John Gural is the Mayor of Palmyra, New Jersey and was elected as a Democrat. Ted Rosenberg, Esq., a Democrat, is the Township Attorney in Palmyra, New Jersey. Bruce Afran, Esq. is an adjunct law professor at Rutgers-Camden law school and has run for office as a Republican.

A. Facts

"The best thing you do . . . Make him a fucking judge and get rid of him. . . [he] disappears... whatever the case" Boss George Norcross[1]

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[1] Transcript of conversation recorded by New Jersey State Attorney General at Commerce Bank Headquarters of "Boss" George Norcross, p. 40, 1/3/01 Transcript.

"[I]n the end, the McGreevey's [the former New Jersey Governor], the Corzines [the current New Jersey Governor], they're all going to be with me. Because not that they like me, but because they have no choice." Boss George Norcross[2]

1. Evidence of Crimes Presented To A Federal Grand Jury.

Petitioner John Gural is the Mayor of Palmyra, New Jersey. In 2000 he was approached by "Boss" George Norcross, one of the most powerful leaders of the Democratic party in New Jersey. Gural is also a Democrat. Norcross demanded that Gural fire Petitioner Ted Rosenberg, the Township Attorney for Palmyra. In return, Gural was promised more business opportunities; if he declined, it was made clear that Gural's business would suffer.

Norcross wanted the Township Attorney fired because he was known as a political reformer within the Democratic Party. Norcross also wanted the Township to do more business with entities he controlled.

Norcross is one of the dozen or so most powerful men in New Jersey; he personally claims to be more powerful than Governors or Senators, and he doesn't hold any office. He is almost always referred to in the press as "Boss Norcross".[3] (Except for a brief interregnum under the governorship of Woodrow Wilson, politics in New Jersey has been dominated by the "Boss" system: the Bosses raise the money, pick the candidates and control each major political party, right down to the county and township level.)

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[2] Id.

[3] A. Guenther, "Boss Norcross", Courier-Post, Feb. 16, 2003.

By day, Norcross sits on the board of Commerce Bank, a large regional bank, and controls $60 million of that company's stock; by night, he ladles out corporate cash to political candidates and rules his party with an iron fist. (Although, as in most matters, New Jersey is open for business: Boss Norcross and his bank give liberally to Republicans as well.)

Devoting attention to New Jersey municipalities like Palmyra is quite lucrative for Commerce Bank: one-fifth of the bank's business is government deposits, a cool $4 billion of taxpayer dollars. The $17.7 billion-a-year financial behemoth has ladled out more campaign cash and received more government no-bid contracts than any financial institution in New Jersey. [4] Compared to Boss Tweed, Boss Norcross is a very rich man, and rules with as much power as Boss Tweed ever accrued.

Mayor Gural and Township Attorney Rosenberg came to believe that Norcross was committing crimes and approached the New Jersey Attorney General's office. Specifically, Petitioners knew it was a crime for Norcross to attempt to bribe and extort the Mayor to fire Rosenberg. The Attorney General agreed to investigate and his staff wired Gural and Rosenberg and the two secretly recorded many hours of phone conversations with Norcross and his associates.[5]

The contents of the tapes are stunning for what they reveal about the perversion of American democracy by lobbyists, political bosses and criminal wrongdoers. On April 1, 2005, the tapes were released to the public after

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[4] C. Riley, "Banking On Your Money: Commerce Counts On Political Ties.", Bergen Record, May 21, 2003

[5] The Justices can listen to the actual tapes or read the transcripts at: http://courierpostonline.com/specialreports/jca/

a lawsuit brought by news organizations, including the New York Times and the Philadelphia Inquirer. [6]

The recordings, for example, capture Norcross instructing Gural: "I want you to fire that fuck. [Y]ou need to get this fuck Rosenberg [the town attorney] for me and teach this jerk-off a lesson. He has to be punished...Rosenberg is history and he is done and anything I can do to crush his ass, I wanna do because I just think he's just done, an evil fuck." [7]

Later, Norcross explains how he handled a member of the New Jersey legislature: "I sat him [the legislator] down and said ... 'don't fuck with me on this one... if you ever do that and I catch you one more time doing it, you're gonna get your fucking balls cut off.' He got the message." [8]

Norcross brags that his political enemies will always respect him "[b]ecause they know we put up the gun and we pulled the trigger and we blew their brains out..." [9]

Boss Norcross, himself, sums up the deal. "[I]n the end, the McGreeveys [the former New Jersey Governor], the Corzines [the current New Jersey Governor], they're all going to be with me. Because not that they like me, but because they have no choice" [10]

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[6] Id.
[7] Id.
[8] Id.
[9] Id.
[10] Id.

The transcripts of the recorded phone conversations also reveal multiple efforts on the part of Norcross and his associates to bribe or extort Mayor Gural.[11]

It came as no surprise that despite the cooperation of Gural and Rosenberg, despite the tapes and despite the willingness of two members of Norcross' own party to testify against him, the New Jersey Attorney General refused to indict either Norcross or Commerce Bank.

At the time, New Jersey Attorney General Harvey was almost routinely referred to in the press as "Peter See-No Evil Harvey"[12]. The Attorney General, moreover, was appointed by then Governor James McGreevey – a man Boss Norcross bragged about controlling – and whose ascent to power in New Jersey was substantially bankrolled by Boss Norcross. The Attorney General's office claimed to have lost a videotape of George Norcross meeting *ex parte* with a Deputy Attorney General (the meeting was conceded) in an effort to persuade the Attorney General not to indict. The Attorney General even refused, after declining indictment, to release the taped conversations until compelled by Court order. Instead, the Attorney General focused his energies on bringing an action against Blockbuster Video Inc. for charging customers late fees.

The subsequent New Jersey Attorney General, Zulima Farber, resigned her post after a special prosecutor appointed by the Governor concluded she had herself violated state ethics codes and after it was revealed that the Attorney General had at least four bench warrants

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[11] Id.

[12] B. Engle, "Governor Trying To Work Around Attorney General", Courier-Post, December 6, 2004. ("Public corruption is something Harvey couldn't identify in a lineup.")

outstanding for her own arrest.[13] Welcome to New Jersey.

At this juncture, Petitioners Mayer and Afran – public interest lawyers who frequently fight corruption in government – approached Gural and Rosenberg, whom they had never met before. Mayer suggested they submit their evidence directly to a federal Grand Jury.

On August 8, 2005, they did just that.

They moved before United States District Court Judge Chesler for the following:

1. Permit the Petitioners to present directly to the Grand Jury evidence of federal crimes. The petitioners relied on the First, Fifth and Fourteenth Amendment to the United States Constitution as well as 18 U.S.C.A. § 1504 which provides that "nothing in this section shall be construed to prohibit the communication of a request to appear before the Grand Jury".

2. Issue a declaratory judgment that Rule 7 of the Federal Rules of Criminal Procedure prohibiting Grand Jury's from returning presentments is unconstitutional and that Grand Jury presentments are specifically permitted in the federal system.

3. Impanel a special Grand Jury to investigate widespread violations of racketeering and related statutes by lobbyists and politicians.

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[13] B. DiFalco, "New Jersey Attorney General Quits Over Ethics." ABC.com, August 16, 2006.

The Petitioners further informed Judge Chesler in New Jersey that his brethren Pennsylvania United States District Judge Michael M. Baylson, *sua sponte*, suggested in open court on May 9, 2005 that racketeering charges be brought against Commerce Bank and other defendants in connection with bribes paid to government officials in Philadelphia. The judge presided over a trial in which two executives of Commerce Bank were convicted of conspiracy to commit honest services fraud, in violation of 18 U.S.C. § 371, honest services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346 and honest services mail fraud, in violation of 18 U.S.C. §§ 1341 and 1346. *See United States v. Kemp*, 362 F. Supp. 2d 591; 2005 U.S. Dist. LEXIS 5070 (2005) (and related opinions). Judge Baylson took the further unusual step of sentencing one of the defendants in the scheme to more time than requested by the U.S. Attorney.

Petitioners suggested to Judge Chesler that Boss Norcross and Commerce Bank had engaged in violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) 18 USCS §§ 1961 et seq., the Hobbs Act, 18 U.S.C. § 1951 as well as violations of the statutes prohibiting honest services fraud referenced above. In essence, they claimed that Norcross and Commerce Bank engaged in Palmyra, New Jersey in conduct similar to the conduct that was the subject of the Kemp case: in return for bribes and extortion, government contracts and favors were sought.

2. Background: Criminal Corruption In New Jersey.

Some background regarding pervasive and persistent criminal corruption extant amongst lobbyists, politicians and elected officials in New Jersey (and,

increasingly, the nation) is in order to underscore the important precepts at stake in this case.

New Jersey has established itself in the eyes of academics, political observers and its own citizenry as probably the most criminally corrupt state in the nation. Many federal crimes – including embezzlement, fraud, extortion and theft of honest services – have been prosecuted by the New Jersey U.S. Attorney's office, under pressure from citizens. But these prosecutions are merely the tip of the iceberg. Often, the most powerful politicians and lobbyists in the state are left to continue illegal activity, while lesser figures are prosecuted.

It is impossible to recount the litany of crimes committed by politicians and lobbyists in New Jersey within the confines of a petition for writ of certiorari. A truckload of Brandeis Briefs could not do justice to a venality and avarice that would make the Senators of ancient Rome blush. One is tempted to try, merely because a full recitation of the facts would cause peels of laughter to reverberate down the alabaster hallways of our nation's Highest Court.

Humor, however, ought not to be the motive; underpinning this farce is a substantial unfolding tragedy in the practice of American democracy.

A mere sampling will make the point:

- Former United States Senator Robert Torricelli, a Democrat, ended his campaign for re-election in 2002 after an associate – subsequently imprisoned – admitted to illegal and unreported payments to the Senator. The Senator was never prosecuted even though there was substantial

independent evidence and the associate was prepared to testify against the Senator.[14] (Many people are now on Death Row on the basis of lesser evidence.)

- The presumptive Republican nominee for Senate, James Treffinger, billed himself as a reformer to replace Torricelli; he terminated his candidacy when the FBI raided his offices. He later pled guilty to extorting campaign contributions. [15]

- On the heels of Senator Torricelli's resignation, Governor McGreevey resigned, not so much because he admitted to an extra-marital affair with a man, but because he had placed his paramour on the government payroll in a job he was uniquely unqualified to hold: State Homeland Security Adviser. All the federal security agencies refused to brief the man because, as a foreign national, he could never obtain security clearance. McGreevey was never prosecuted. [16]

- An Assemblyman and close advisor to Newark Mayor Sharpe James was found with $150,000 in stolen cash in the floorboards of his home.[17]

- The leading fundraiser for former Governor James McGreevey, Robert Kushner, was under investigation by the U.S. Attorney's office for illegal campaign contributions when it was

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[14] "Resignation Heats Up Senate Race", BBC News, October 1, 2002.
[15] R. Smothers, "Treffinger Pleads Guilty," New York Times, June 8, 2003.
[16] J. Margolin, "McGreevey's Reclusive Israeli Aide Steps Down" New Jersey Capital Report, August 15, 2002.
[17] B. Alberts, "Williams Scandal Fuels ESsex Reputation for Corruption," PoliticsNJ.com, Dec. 27, 2005.

revealed that Kushner sought to tamper with a federal witness. He did so by hiring a New York City prostitute who arranged for a tryst with the married witness; the encounter was surreptitiously videotaped. Kushner attempted to intimidate the witness by sending him the video.[18]

- The major media in New Jersey have documented in series after series, often on the front page, the corrupt – usually criminal– payoffs that lobbyists tender to public figures in return for government contracts and emoluments.[19]

- Well-known New Jersey lobbyist Alan Marcus confided to New York Magazine: "In New Jersey, you contribute money not for access but results. Anybody who doesn't admit that is lying." [20]

- Petitioner Carl Mayer, while serving on the Princeton Township Committee, was asked by the CBS news program "Sixty Minutes" to assist in an investigation of corruption he witnessed as an elected official. In the course of the Sixty Minutes investigation, the CEO of United Gunite Corporation – a New Jersey company – actually offered a cash bribe to a Sixty Minutes cameraman to stop filming: a first in Sixty Minutes history. After the program aired, federal agents must have decided it was bad for New Jersey's image to have bribes offered on national television; FBI agents tailed the Gunite CEO and

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[18] R. Smothers, "Democratic Donor Receives Two-Year Prison Sentence," New York Times, March 5, 2005.

[19] See e.g. "The Power Brokers: How A Dozen Men Control New Jersey Politics", Asbury Park Press, October 24, 2004.

[20] C. Horowitz, "Jim McGreevey And His Main Man," New York Magazine, Sep. 20, 2004.

found that he was offering unreported cash bribes to public officials throughout the state of New Jersey in return for government contracts.[21]

- In New Jersey the practice of exchanging money for government contracts and favors is routinely referred to as "Pay-To-Play," leaving no doubt that an illegal *quid pro quo* is the order of the day.

- By 2004 New Jersey had developed such a national reputation for criminal corruption that its interim Governor Richard Codey (appointed by Jim McGreevey) decided that the State needed a new slogan to repair its image. Contests to coin a slogan were held around the state; herewith some entries submitted by New Jersey's own citizens:

  "New Jersey: Pay to Play: Reap the Benefits."

  "New Jersey: Where the roads are paved and the pockets lined with good intentions"

  "New Jersey: Pay to play, play to win".

  "New Jersey: Corrupt and proud."

  "New Jersey: Everything you've heard is true."

  "New Jersey: One state, under indictment."[22]

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[21] CBS Sixty Minutes, May 12, 1996.

[22] M. Yant Kinney, "New Jersey: Who Needs A Slogan," Philadelphia Inquirer, Nov. 15, 2005.

The current race for United States Senator in New Jersey is, once again, consumed exclusively with whether the Democratic or Republican nominee is more criminally corrupt. The U.S. Attorney for New Jersey even took the unusual step of issuing – during the campaign – a subpoena to the Democratic nominee for Senate regarding possible illegal real estate dealings. The Democratic Party promptly accused the U.S. Attorney for New Jersey of being partisan, pointing out that he and his family are major political contributors to the Republican Party and the President of the United States.[23]

And, so it goes. Amidst endless posturing, there is no serious effort to end criminal political corruption in New Jersey. Massive illegality by the leaders of government undermines the rule of law and saps confidence in every branch of government, including the judiciary.

Petitioners respectfully urge this Court to issue the writ to determine whether the federal Grand Jury can launch its own investigations and presentments and fulfill its historic and constitutional role as the "fourth branch of government": the critical backstop essential to terminating criminal corruption in High Office.

B. Proceedings Below

The District Court denied Petitioners motion on January 3, 2006. See App. 2a.

The Third Circuit Court of Appeals granted summary action on May 8, 2006. See App. 1a.

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[23] C. Mondics, "Menendez Hits US Attorney Over Subpeona", Philadelphia Inquirer, September 9, 2006.

Mr. Justice Souter granted an extension of time until October 5, 2006 to file this petition for writ of certiorari.

REASONS FOR GRANTING OF THE PETITION

"The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them." Patrick Henry

"America will never be destroyed from the outside. If we falter and lose our freedoms, it will be because we destroyed ourselves." Abraham Lincoln

The Petition should be granted for several reasons. First, the Third Circuit, in upholding the District Court's opinion that Grand Juries cannot make presentments, directly contravened the language and history of the Fifth Amendment of the United States Constitution. Second, the opinion below reflects a split in the Circuits that must be resolved. Third, Supreme Court *dicta* suggesting that Grand Juries have autonomous power conflicts with the Federal Rules of Criminal Procedure. Fourth, this case raises the issue of whether a citizen's right to submit evidence of crimes to Federal Grand Juries is protected by the First, Fifth and Fourteenth Amendment to the Constitution. Finally, the Court should grant the Petition to determine how Grand Juries fit within the Separation of Powers scheme conceived by the Founders.

A. The Third Circuit Order Countermands the Fifth Amendment of the U.S. Constitution and Places Squarely Before the Court The Issue Of Whether A Provision of The Federal Rules of Criminal Procedure Denying A Grand Jury's Autonomous Power Violates The Constitution

And Hundreds Of Years of Independent Action by Grand Juries.

The Third Circuit, in granting summary action, upheld the District Court. The core of the District court ruling was that the Federal Rules of Criminal Procedure do not allow "presentments": investigations conducted solely by the Grand Jury, without the assistance of prosecutors. See App. at 7a. The District Court also held that individuals cannot present facts directly to a Grand Jury.

The courts below relied on the notes of the advisory committee to the Federal Rules of Criminal Procedure Rule 7. ("Presentment is not included as an additional type of formal accusation, since presentments as a method of instituting prosecutions are obsolete, at least as concerns the Federal courts."). FED. R. CRIM. P. 7 (a) adv. comm. note 4; *see* CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 121, at 338 (1982). See App. 3a.

The constitutionality of this advisory rule was prefigured by Justice Hugo Black, who dissented from the decision to enact the Federal Rules of Criminal Procedure:

"Whether by this transmittal the individual members of the Court who voted to transmit the rules intended to express approval of the varied policy decisions the rules embody I am not sure. I am reasonably certain, however, that the Court's transmittal does not carry with it a decision that the amended rules are all constitutional." Fed. R. Crim. P., Orders of the Supreme Court of the United States Adopting and Amending Rules, Order of Feb. 28, 1966 (Black, J., dissenting). See Renee B. Lettow, Reviving Federal Grand Jury

Presentments, 103 Yale L.J. 1333, 1342 n.50 (1994).

The Fifth Amendment to the United States Constitution states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a **presentment** or indictment of a Grand Jury." U.S. Const. amend. V.

In making a distinction between indictment and presentment[24], the Framers undoubtedly understood that in colonial times Grand Juries acted as self-governing bodies and used their time-honored powers to make presentments independent of government prosecutors.

Both the language and legislative history of the Constitution grant considerable autonomy to Grand Juries and grant citizens the right to present information to a Grand Jury of a crime. See Phillip E. Hassman, Annotation, Authority of Federal Grand Jury To Issue

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[24] Black's law dictionary defines presentment:

> "The written notice taken by a Grand Jury of any offense, from their own knowledge or observation, without any bill of indictment laid before them at the suit of the government. A presentment is an accusation, initiated by the Grand Jury itself, and in effect an instruction that an indictment be drawn."

A similar procedure is described by Blackstone under the heading of "Prosecution – By Presentment":

> "A presentment, *properly* speaking, is the notice taken by a Grand Jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king, as the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterward frame an indictment, before the party presented can be put to answer it. W. BLACKSTONE, COMMENTARIES at 301. (1854).

Indictment Or Report Charging Unindicted Person With Crime Or Misconduct, 28 A.L.R. Fed. 851 (1976).

The ancient history of Grand Juries, both in England and colonial America, demonstrates that these bodies acted independently of prosecuting authorities. This was the very purpose of the institution: to act as a bulwark against tyrannical power and to provide an outlet for grievances against corrupt officials.[25]

Grand Juries were enormously popular in the Revolutionary period. Local Grand Juries refused to indict the editors of the Boston Gazette for libeling the

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[25] The Grand Jury may be the oldest institution in America's criminal justice system:

> It originated in 1164 when King Henry II signed the Constitutions of Clarendon, which allowed for the use of an accusing jury to charge all laity who were to be tried in ecclesiastical courts. Two years later he established the Assize of Clarendon, which was composed of twelve men who would "present" those suspected of crimes to the royal courts. These accusatory panels were progenitors of the modern-day Grand Jury. See Helene E. Schwartz, Demythologizing the Historic Role of the Grand Jury, 10 Am. Crim L. Rev. 701, 703-710 (1972); Marvin E. Frankel & Gary Naftalis, The Grand Jury: An Institution on Trial (1977).

In pre-Revolutionary America, the Grand Jury took on a life of its own. See Mark Kadish, Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process, 24 Fla. St. U. L. Rev. 9 (1996). American grand juries initiated prosecutions against corrupt agents of the government, often in response to complaints from individuals acting "in several of the colonies as spokesmen for the people... and [as] vehicles for complaints against officialdom." Frankel & Naftalis, supra, at The Grand 107-116 (1977). Note, Powers of Federal Grand Juries, 4 Stan. L. Rev. 77 (1951).

governor of Massachusetts and refused to indict the leaders of the Stamp Act Rebellion. Frankel & Naftalis at 11. A Philadelphia Grand Jury condemned the use of the tea tax to compensate British officials, encouraged a rejection of all British goods, and called for organization with other colonies to demand redress of grievances. Frankel & Naftalis, at 11-12. A Boston Grand Jury in 1769 actively sought to enforce the law against British soldiers by indicting them for alleged transgressions against citizens, such as breaking and entering private homes. Richard D. Younger, The People's Panel: The Grand Jury in the United States, 1634-1941, at 29-30(1963). During the Revolutionary war, Grand Juries indicted for treason those individuals who joined or colluded with the British army.

The process for receiving private testimony, outside the presence of the court officials, remained a common practice for a century after the Grand Jury was enshrined in the Bill of Rights. Richard Calkins, The Fading Myth of Grand Jury Secrecy, 1 J. Marshall J. Prac. & Proc. 18, 19 (1967). Throughout the 19th century, Grand Juries often acted on their own initiative in the face of opposition from a district attorney. It was just such a Grand Jury that probed and toppled the notorious Boss Tweed and his cronies in New York City in 1872. Without the prosecutor's assistance, the Tweed Grand Jury independently carried out its own investigation in a district that had otherwise been very loyal to Tweed. See Frankel & Naftalis, supra at 15.[26]

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[26] The Populist era of the early 20th Century saw some attempts to revitalize the Grand Jury. During that period, ex-jurors acted to protect the Grand Jury's powers by forming associations. The Grand Juror's Association of New York was founded in 1912, and began publishing The Panel, a pro-Grand Jury periodical, in 1924. Chicagoans founded the Grand Juror's Federation of America in

Many states explicitly allow citizens to directly present evidence of crimes to a Grand Jury.[27]

1931, and associations apparently sprang up in other localities. See Renee B. Lettow, Reviving Federal Grand Jury Presentments, 103 Yale L.J. 1333, 1342 n.50 (1994). J. Jacoby, Origins and Development of American Prosecutions (1980)

In the modern era, commentators still champion the institution: "Grand juries come from the people. They are not elected and thus are not involved in the political process. Their oath and composition assure a non-partisan body. The Grand Jury does its job with no axe to grind and then disperses." Peter Megargee Brown, Ten Reasons Why the Grand Jury in New York Should Be Retained and Strengthened, 22 Rec. Bar Ass'n N.Y. 471, 472 (1967). Grand juries are seen as an essential link between the people and the law, as non-political and non-partisan, as the people's conscience and having the confidence of the public.

[27] Some states allow citizens to contact grand juries by statute, but leave it to the discretion of the judge to allow the citizen to appear before the Grand Jury. . See, e.g., Colo. Rev. Stat. § 16-5-204(4)(l) ("Any person may approach the prosecuting attorney or the Grand Jury and request . . . to appear before a Grand Jury. . . . The court may permit the person to testify or appear before the Grand Jury, if the court finds that such testimony or appearance would serve the interests of justice."); Me. Rev. Stat. Ann. tit. 15, § 1256); Neb. Rev. Stat. § 29-1410.01; N.C. Gen. Stat. § 15A-626(d)

Other state statutes explicitly allow citizens to present evidence of crimes to a Grand Jury. Tenn. Code Ann. § 40-12-104(a) ("Any person having knowledge or proof of the commission of a public offense triable or indictable in the county may testify before the Grand Jury."); Tex. Crim. Proc. Code Ann. § 20.09 ("The Grand Jury shall inquire into all offenses liable to indictment of which any member may have knowledge, or of which they shall be informed by the attorney representing the State, or any other credible person.").

West Virginia is unique because a citizen's right to approach a Grand Jury and present evidence of an offense is a constitutional right. State ex rel. Miller v. Smith, 285 S.E. 2d 500 (W. Va. 1981). The Supreme Court of West Virginia stated the following in justifying this right: "To fulfill its functions of protecting individual citizens and providing them with a forum for bringing complaints within the criminal justice system, the Grand Jury must be open to the public for the independent presentation of evidence

The Framers of the Constitution were familiar with the historic role of Grand Juries in this country and in England. The Grand Jury was considered so important by the nation's Founding Fathers that the Bill of Rights included an amendment guaranteeing the right of an indictment by a Grand Jury for all infamous or capital crimes. Its use was so accepted by the colonists however, that it wasn't even considered an issue to be defended by Hamilton when The Federalist Papers were published in support of the proposed Constitution. Madison, for example, was specifically intent upon keeping an independent Grand Jury in the new Constitution because of that institution's centrality to fighting the Crown. Karson, The Implications of a Key-Man System for Selecting a Grand Jury: An Exploratory Study (2006) *Southwest Journal of Criminal Justice*, Vol. 3(1). pp. 3-16. *See* Drew R. McCoy, *The Last of the*

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before it. [Thus], ... any person may go to the Grand Jury to present a complaint to it." Id. at 504-05.

Other states permit citizens to contact grand juries by operation of common law. See, e.g., King v. Second Nat'l Bank & Trust Co., 234 Ala. 106, 173 So. 498, 499 (Ala. 1937); In re Lester, 77 Ga. 143, 1886 WL 1476, at 3 (Ga. 1886) (holding that "any citizen" can prosecute offenses or "give information of the fact to the Grand Jury"); State v. Stewart, 45 La. Ann. 1164, 14 So. 143, 145 (La. 1893) (In re Petition of Thomas, 434 A.2d 503, 507 (Me. 1981); Piracci v. State, 207 Md. 499, 115 A.2d 262, 268 (Md. 1955) citing Brack v. Wells, 184 Md. 86, 40 A.2d 319, 321-24 (Md. 1944))); Hott v. Yarborough, 112 Tex. 179, 245 S.W. 676 (Tex. Comm'n App. 1922) ("It is unquestionably the right, if not, in fact, the duty, of every one who has knowledge of the commission of a criminal offense . . . to call to the attention of the Grand Jury the facts within his knowledge . . . .") Cf. IN THE MATTER OF THE GRAND JURY APPEARANCE REQUEST BY LARRY LOIGMAN, ESQ., SUPREME COURT OF NEW JERSEY, 2005 N.J. LEXIS 303, (April 11, 2005,).See, e.g., Morgan v. Null, 117 F. Supp. 11, 15 (S.D.N.Y. 1953) ("New York State has long denied any right of a person to submit information to, or to be heard before, a Grand Jury.)

Fathers: James Madison & the Republican Legacy 89 (1989)

B. The Court of Appeals Holding Conflicts With Rulings in Other Circuits On The Issue Of Grand Jury Independence.

The Supreme Court should grant the petition because there is a split in the circuits, with the Fifth Circuit suggesting in *dicta* that Grand Juries are not independent and at least one court in the 9th Circuit ruling they are independent and have presentment power.

The Fifth Circuit cases relied on by the District Court below (App. at 3a) do suggest that Grand Jury presentments are obsolete but none so hold and the language is *dicta*.[28] These cases never reach the question of whether federal Grand Juries can independently issue presentments. United States v. Briggs, 514 F.2d 794(5th Cir. 1975) really deals with the issue of whether a Grand Jury can issue a report naming an individual without indicting. See App. 3(a).[29]

The central case relied upon by the Third Circuit below was United States v. Cox, 342 F.2d 167 (5th Cir. 1965) involving an effort by a federal Grand Jury in Mississippi to exert its autonomy and hold the U.S. Attorney in

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[28] The District Court below also relied on United States v. Christian 660 F.2d 892 (3d Cir. 1981) for the proposition that presentments are obsolete in the federal system. That case ruled only that presentments are not in force in the U.S. Virgin Islands and never reached the constitutionality of the Federal Rules of Criminal Procedure.

[29] United States v. Zavala, 839 F.2d 523, 529 (9th Cir. 1988), cert. denied, 488 U.S. 831, 102 L. Ed. 2d 62, 109 S. Ct. 86 (1988), also relied on by the Third Circuit below, only addresses the issue of presentment in the dissent.

contempt for failing to obey the Grand Jury's order to indict a group of persons in Mississippi. This extraordinary case, with multiple opinions, dissents and concurrences, occurred in the racially charged atmosphere of the 1960's in which it appeared that a white jury wanted to indict African-American defendants. Although a narrow 4-3 majority concluded that the Executive Branch thorough the U.S. Attorney General must sign an indictment, a majority concurrence written by judge Wisdom, also suggested the following: "A criminal presentment based on the Grand Jury's own knowledge or on knowledge furnished by others may be in disuse in federal courts, but it has not been read out of the Constitution." *Id.* at 189 (Wisdom J., concurring specially) citing *Hale v. Henkel*, 1906, 201 U.S. 43, 62, 26 S.Ct. 370, 50 L.Ed. 652. n12 *See also Blair v. United States*, 1919, 250 U.S. 273, 280, 39 S.Ct. 468, 63 L.Ed. 979 and *Sullivan v. United States*, 1954, 348 U.S. 170, 173, 75 S.Ct. 182, 99 L.Ed. 210; Kuh, The Grand Jury 'Presentment'; Foul Blow or Fair Play, 55 Col.L.Rev. 1103 (1955).[30]

In United States v. Cox there was even disagreement as to what constitutes a presentment. Some judges read a presentment to mean simply that anyone can present evidence to a Grand Jury; others argued that presentment means the Grand Jury has a power to indict on its own. This is an additional reason that this Court ought to grant the petition for certiorari.

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[30] United States v. Coachman, 243 U.S. App. D.C. 228, 752 F.2d 685, 689 n.23 (D.C.Cir. 1981) also relied on by the Third Circuit, held only that the "use of an adequate indictment has become a constitutional imperative and never reached the question of whether the Grand Jury has independent presentment powers.

In a Northern District of California case, United States v. Smyth, 104 F. Supp. 283, 287 n.1 (N.D. Cal. 1952), decided after the adoption of the Federal Rules of Criminal Procedure, Chief Judge Fee concluded that: "grand jurors . . . may initiate prosecutions based on information received from persons who have no connection officially with them." Id. at 295. Squarely before the court was the issue of whether Grand Juries can receive information from sources independent of the prosecutor and whether Grand Juries have independent presentment power. The case holding answered both questions in the affirmative.

Judge Fee elaborated the distinguished pedigree of the Grand Jury:

> "The institution of the Grand Jury is a development which comes to us out of the mists of early English history. It has undergone changes, but has been remarkably stable because the institution has been molded into an instrument of democratic government, extraordinarily efficient for reflecting not the desires or whims of any official or of any class or party, but the deep feeling of the people. As such, with its essential elements of plenary power to investigate and secrecy of its deliberations, it was preserved by the Constitution of the United States not only to protect the defendant but to permit public spirited citizens, chosen by democratic procedures, to attach corrupt conditions. A criticism of the action of the Grand Jury is a criticism of democracy itself.
>
> The Grand Jury developed a stubborn tenacity of its own. Ever since they wrote 'Ignoramus' upon the bill of indictment presented by the Crown

against the Earl of Shaftsbury, it has been held an inviolable tradition that they need follow the orders or instruction of the judge neither as to what they consider nor as to whom they indict or fail to indict. The Grand Jury is similar to the trial jury, who may convict notwithstanding positive instructions to acquit and who may pardon notwithstanding a direction to find guilty. Unquestionably, the Grand Jury are under no necessity to follow the orders of the prosecutor. They can present an indictment whether he will or no. Indeed, they may have a presentment contrary to the direct orders of a judge, the prosecutor for the King or the Chief Executive.

This power of the Grand Jury springs from inherent qualities. The jurors are instruments of the people of the community. They reflect the sentiment of the particular locale- the fama publica. In their character as representatives, they may call for witnesses and documents which may verify or negative the suspicions or rumors of crime which affect the neighborhood. In his character as witness, each may speak of those things which he himself has observed. In England the private person who claimed a crime has been committed could lay an indictment before the Grand Jury. Although private prosecutions as such have been abandoned in the country, the grand jurors retain enough of this tradition that they may initiate prosecutions based on information received from persons who have no connection officially with them.

Under the Federal Constitution, a Grand Jury may either present or indict. The word 'presentment' technically characterizes the

process whereby a Grand Jury initiates an independent investigation and asks that a charge be drawn to cover the facts should they constitute a crime. The authority to initiate independent investigations cannot be taken away without erasing the word 'presentment' from the fundamental law of the land.

The Grand Jury breathes the spirit of a community into the enforcement of law. Its effect as an institution for investigation of all, no matter how highly placed, creates the élan of democracy. Here the people speak through their chosen representatives. This feature has been largely disregarded by the critics. But it is the essence of the rule of the people. The grand jurors may commit serious errors. But the voters are not deprived of suffrage because of occasional mischances." Id. at 291-296.

C. *The Supreme Court in Hale and Stirone Suggested That Grand Juries Are Autonomous In Contradiction To the Advisory Notes To the Federal Rules of Criminal Procedure. This Conflict Needs To Be Resolved.*

The Supreme Court has often suggested in *dicta* that Grand Juries are independent of federal prosecutors, language that is directly at odds with the Third Circuit holding here. Moreover, the Supreme Court opinions date from both before and after the enactment of the Federal Rules of Criminal Procedure. As the Supreme Court has written, "the very purpose of the requirement that a man be indicted by Grand Jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *United States v. Stirone*, 361 U.S.

212, 218 (1960); *see United States v. Sells Engineering, Inc.*, 463 U.S. 418, 430 (1983) ("The purpose of the Grand Jury requires that it remain free, within constitutional and statutory limits, to operate independently of either prosecuting attorney or judge.'")

The Supreme Court emphasizes the linkage between the constitutional right to Grand Jury indictment and the Grand Jury's institutional independence. The Fifth Amendment right is not simply a technical right to have a Grand Jury sign the prosecutor's indictment, but rather a "right to have the Grand Jury make the charge on its own judgment," a constitutional entitlement that the Court describes as a "substantial right." *Stirone*, 361 U.S. at 218-219 (refusing to allow trial court to amend Grand Jury indictment).

According to the Supreme Court, the Grand Jury is "entitled to determine for itself whether a crime has been committed." *R. Enter. Inc.*, 498 U.S. at 303. In this view, the Grand Jury has broad subpoena powers because it needs to inquire into "all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred." *Id.* at 297.

In 1906 the United States Supreme Court dealt with the question of whether Grand Juries could be restricted from straying into investigations of issues not formally presented to them by prosecutors. *Hale v. Henkel*, 201 U.S. 43 (1916). The Court held that it was "entirely clear... under the practice in this country," that grand jurors may proceed upon either their own knowledge or upon the examination of witnesses brought before them, "to inquire for themselves whether a crime cognizable in the court has been committed." See generally Note, The Grand Jury as an Investigatory Body, 74 Harv. L. Rev.

590 (1961). *See also Frisbie v. United States*, 157 U.S. 160, 163, 15 S. Ct. 586, 587, 39 L. Ed. 657, 658 (1895)("But in this country the common practice is for the Grand Jury to investigate any alleged crime, no matter how or by whom suggested to them...")

D. The Third Circuit Ruling Decided Adversely to The First, Fifth and Fourteenth Amendment Rights of Citizens To Directly Submit Evidence To Grand Juries.

In *Woods v. Georgia* 370 U.S. 375 (1962) the U.S. Supreme Court held that individuals have First, Fifth and Fourteenth Amendment rights to present information to a Grand Jury:

> "Particularly in matters of local political corruption and investigations it is important that freedom of communication be kept open and that the real issues not become obscured to the Grand Jury. It cannot effectively operate in a vacuum. It has been said that the 'ancestors of our 'grand jurors' are from the first neither exactly accusers, nor exactly witnesses; they are to give voice to common repute.' Id. at quoting 2 Pollock and Maitland, History of the English Law (2d ed. 1909)."

These provide independent constitutional grounds for the Court to grant the petition.") *See also, State ex rel. Wild v. Otis*, 257 N.W.2d 361, 364 (Minn. 1977) ("[A citizen]... is free to attempt to get the Grand Jury to take action, and under [Minnesota court rules], the Grand Jury can permit an aggrieved citizen to appear as a witness for this purpose."), cert. denied sub nom. *Wild v. Otis*, 434 U.S. 1003, 98 S. Ct. 707, 54 L. Ed. 2d 746 (1978).

E. The Third Circuit Ruling Would Leave The Grand Jury As An Appendage Of The Executive Branch and Violate Separation of Powers.

By placing the Grand Jury under the complete control of prosecutors, the Third Circuit ruling violates the very Separation of Powers scheme central to the United States Constitution, raising grave constitutional concerns.

The Framers of the Constitution were massively focused on avoiding the corruption of societies throughout history. Steeped in Ancient history and literature, the Framers entire concept of constitutional democracy based on Separation of Powers was informed by their profound desire to avoid the tyranny not just of George III, but of autocrats through the Ages. The eminent and historically-minded John Adams analogized to the Roman Republic to explain the alarming threat to the foundations of English liberty by corrupt legislators. "The government of England" he said (quoting Roman historian Sallust), had descended to the level where "the Roman republic was when Jugurtha left it, having pronounced it a 'venal city, ripe for destruction if it can only find a purchaser.' "

Adams words could describe parts of the American Republic in the twenty-first century.

The Founders solution was to create a balance of power scheme that relied on institutions to curb the debased actions of men. The Grand Jury was just such an institution. Often called the "fourth branch" of government, the Grand Jury has for many years of this Republic been central to independently and autonomously rooting out corruption in High Office. This is not a Democratic or Republican issue; it is not an

ideological issue. Rather, this issue goes to the very question of what institutions are necessary and constitutionally mandated for the functioning of a vibrant democracy.

This Court need not grant a petition to review the autonomy of Grand Juries in every context; it could simply make a limited inquiry as to whether autonomy is merited on the specific issue of criminal political corruption.

If ever there was a time in American history that a revitalized institution – dedicated to its historic role – was required, that time is now. If ever the Supreme Court needed to clarify the role of this fundamental entity, that moment has arrived.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Carl J. Mayer, Esq.
pro Se
MAYER LAW GROUP
66 Witherspoon Street,
Suite 414
Princeton, New Jersey
08542
609-921-0253

Bruce Afran, Esq.
pro se
10 Braeburn Drive
Princeton, NJ 08540
(609)924-2075

Ted Rosenberg, Esq.
pro se
321 New Albany Road
P.O. Box 97
Moorestown, NJ
08057
(856)608-9999

John Gural
pro se
739 Parry Avenue
Palmyra, NJ 08065
(609)868-1303

(any footnotes trail end of each document)
Dated: 4/11/06
No. 06-1235

IN RE: PETITION OF CARL J. MAYER, ESQ.

Carl J. Mayer, Esq. Appellant

U.S. District Court of New Jersey (Trenton): No. 05-mc-33

Present: SLOVITER, MCKEE AND FISHER, Circuit Judge

1. Motion by Appellee, USA, for Summary Action.

2. Response by Appellant in Opposition to Motion for Summary Action.

ORDER

The foregoing motion for Summary Action is hereby granted.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN THE MATTER OF THE APPEARANCE OF
CARL J. MAYER, ESQ., et al. BEFORE A
FEDERAL GRAND JURY

MISC. NO. OS-33 (SRC)

OPINION

CHESLER, District Judge

THIS MATTER comes before the Court on a motion (docket entry #1), filed by Petitioners, requesting this Court to: (1) impanel a special grand jury to examine alleged violations of federal racketeering and related laws; (2) permit the Petitioners to present evidence to this special grand jury "autonomously and independently" of the United States Attorney's Office; and (3) issue a declaratory judgment that the Advisory Committee Notes to FED. R. CRIM. P. 7 prohibiting federal grand juries from returning presentments[1] is unconstitutional and that presentments to federal grand juries are specifically permitted in the federal system. The Court, having considered the papers submitted by the parties, for the reasons set forth below, and for good cause shown, DENIES the Motion.

I. DISCUSSION

A "presentment" is "an accusation that is initiated by the grand jury itself."[2] 38A C.J.S. Grand Juries § 85 (2005). The distinction between a presentment and an indictment is that an indictment is prepared by a prosecutor and approved by the grand jury, while presentments are charges prepared by the grand jury on its own initiative. 1 C. WRIGHT, FEDERAL (CRIMINAL) PRACTICE AND PROCEDURE § 121, at 58 (1999). See also In re Grand Jury Proceedings, Special Grand Jury 89-2, 813 F. Supp.1451,1462 (D.Colo.1992) ("In contrast to an indictment, a presentment is `an accusation initiated by the grand jury itself, and in effect an instruction that an indictment be drawn.'") (quoting United States v. Briggs, 514 F.2d 794, 803 n, 14 (5th Cir.1975)). Historically, the charges in a presentment would need to be restated in formal terms by the government in the form of an indictment in order to initiate criminal proceedings. S. BEALE, W. BRYSON, J. FELMAN, M. ELSTON, GRAND JURY LAW AND PRACTICE, § 1.8 (2d Ed. 2005).

In modern practice, presentments are no longer used in the federal grand jury system. Under the Federal Rules of Criminal Procedure, there are specific provisions to empower federal grand juries to file indictments, provided that they are "signed by an attorney for the government," but there are no provisions that enable federal grand juries to deliver a presentment. See FED. R. CRIM. P. 7. The Advisory Committee Notes accompanying Rule 7 explain this omission by noting that "presentments as a method of instituting prosecutions are obsolete, at least as concerns Federal courts." FED. R. CRIM. P. 7(a), adv. comm. note 4.

The Petitioners in this case are seeking to present their information to a federal grand jury "autonomously and independently" of the US Attorney's Office. (Pl. Br. at 1.) To grant the Petitioners' motion would require a finding that federal grand juries have the ability to employ their investigatory and charging powers without the participation of the US Attorney's Office or other government attorneys acting as prosecutors in the process. The current federal rules governing the formation and function of grand juries grant no authority for returning presentments, leaving federal grand juries without the statutory ability to bring criminal charges without the participation of a government attorney. In order to overcome this statutory limitation and grant the Petitioners' motion, this Court would need to find adequate constitutional grounds to overrule the relevant federal rules of criminal procedure regarding federal grand juries and their ability to return presentments. For the reasons noted below, however, this Court finds that there is no constitutional or statutory right for individuals to bypass government prosecutorial authorities and present allegations or evidence of a crime directly to a federal grand jury, nor are the current federal rules which deny federal grand juries the authority to return presentments unconstitutional. Accordingly, the Petitioners' motion is DENIED.

A. There is No Constitutional Right for Private Citizens to Independently Bring Criminal Charges and Allegations Before a Federal Grand Jury.

Under the Fifth Amendment, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a

Grand jury." U.S. CONST, AMEND, V. The Petitioners allege that "individuals have First, Fifth and Fourteenth Amendment rights to present information to a [g]rand jury." (Pl. Br, at 3.) To support this contention, Petitioners have noted a series of historical precedents that all support the notion that a grand jury functions as an independent body, authorized to act "independently of either prosecuting attorney or judge." (Pl. Br. at 3 (quoting U.S. v. Stirone, 361 U.S. 212, 218 (1960).) This independence, however, is designed to "'afford a safeguard against oppressive actions of the prosecutor or court,"' not to allow individuals to present to a grand jury independently of the government prosecutor. Gaither v. U.S., 413, F.2d 1061, 1066 (D.C. Cir.1969) (quoting U.S. v. Cox, 342 F.2d 167,170 (5th Cir.1965) (emphasis added). The constitutional role of the grand jury is to serve as "a check on prosecutorial power, not a substitute for the prosecutor," In re Grand Jury Proceedings, Special Grand Jury 89-2, 813 F.Supp. 1451, 1462 (D.Colo.1992).

The constitutionally enshrined role of the grand jury lies in its ability to protect individuals against unfounded criminal prosecutions by conducting an independent inquiry to determine whether there is probable cause to believe a crime has been committed. United States v. Sells Eng'g, 463 U.S. 418, 423 (1983). As the Fifth Circuit noted:

> The constitutional requirement of an indictment or presentment as a predicate to a prosecution for capital or infamous crimes has for its

> primary purpose the protection of the individual from jeopardy except on a finding of probable cause by a group of his fellow citizens, and is designed to afford a safeguard against oppressive actions of the prosecutor or a court. The constitutional provision is not to be read as conferring on or preserving to the grand jury, as such, any rights or prerogatives. The constitutional provision is, as has been said, for the benefit of the accused.

U.S. v. Cox, 342 F.2d 167,169 (5th Cir. 1965) (emphasis added).

While the grand jury serves a dual purpose, acting as "both a sword and a shield of justice - a sword because it is the terror of criminals, [and] a shield because it is the protection of the innocent against unjust prosecution," the grand jury "earned its place in the Bill of Rights by its shield, not by its sword." Id. at 186 (Wisdom, J., concurring); see also SUSAN W. BRENNER, GREGORY G. LOCKHART, 2 FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE, §2.2 ("The clause [(of the Fifth Amendment)] was intended to preserve a shield against unwarranted prosecution.") Under the Fifth Amendment, the grand jury affords constitutional protections to preserve the rights of the accused. There is, however, no corresponding constitutional right for individuals to use the power of a grand jury to levy criminal accusations.[3] See Cox, 342 F.2d at 186 (Wisdom, J., concurring) (noting that when the role of a grand jury "goes beyond inquiry and report and becomes accusatorial, no aura of traditional or

constitutional sanctity surrounds the grand jury"). Accordingly, the Petitioners cannot claim a constitutional prerogative that would allow them to independently bring criminal charges and accusations before a federal grand jury.

B. There is No Constitutional Requirement for Grand Juries to be Empowered to Return Presentments.

The constitutional role of the grand jury in protecting the accused does not necessarily require that the grand jury be empowered to return a presentment.

> The Fifth Amendment ... does not offer a grand jury a choice between presentment or indictment. Unless there is a bill of indictment preferred to the grand jury at the instance of the Government, there can be no indictment. It is entirely in the hands of the Government whether to submit an accusation to the grand jury leading to presentment in the form of an indictment and serving as the initial pleading in a criminal prosecution.

U.S. v. Cox, 342 F.2d 167,186 (5th Cir. 1965) (Wisdom, J. concurring). While presentments are no longer used in federal practice, the requirement for adequate indictments in order to commence prosecutions adequately fulfills the constitutional requirements of the Fifth Amendment in protecting the rights of the accused.[4] See United States v. Coachman, 752 F.2d 685, 689 n. 23 (D.C.Cir.1981) (noting "use of an adequate indictment has become a constitutional imperative"); 1 C. WRIGHT, FEDERAL

(CRIMINAL) PRACTICE AND PROCEDURE, § 121, at 518 (1999) ("The use of a presentment is obsolete in the federal courts[,] ... [a]ccordingly, where the constitutional provision is applicable, an indictment must be used.") Because there is no constitutional requirement that grand juries be empowered to issue presentments, the Petitioners' request that this Court issue a declaratory judgment that the Advisory Committee Notes to FED. R. GRIM. P. 7, which specifically preclude federal grand juries from issuing presentments, are unconstitutional is DENIED.

C. There is No Statutory Authority to Permit the Petitioners to Bypass Government Prosecutorial Authorities to Directly and Independently Present Allegations of Criminal Activity to a Federal Grand Jury.

Grand juries, as an institution, were adopted from the common law and, through the Fifth Amendment, "became a fundamental part of our country's system for the prosecution of crime." U.S. v. Christian, 660 F.2d 892, 897 (3d Cir.1981) (citing Ex Parte Bain,121 U.S. 1, 6 (1887); U.S. v. Calandra, 414 U.S. 338, 343-44 (1974)). Grand juries, however, are "creature[s] of statute." Id. at 898 (citing In Re Mills, 135 U.S. 263, 267 (1890)). The statutory authority for grand juries is provided for and limited by the Federal Rules of Criminal Procedure. Id. at 900 n13 (citing U.S. v. Fein, 504 F.2d 1170 (2d Cir.1974)).

The statutory authority that governs federal grand juries does not grant the authority to these grand juries to issue presentments. Id. at 901 (noting that

"nothing in the language of [FED. R. CRIM. P.] 6 and 7 lends any support to the proposition that any federal grand juries are authorized to make presentments"); see also FED. R. CRIM. P. 7(a), adv. comm. note 4 (noting "presentments as a method of instituting prosecutions are obsolete, at least as concerns Federal courts"). Absent the statutory authority to make presentments, the sole means for a federal grand jury to accuse a suspect of a crime is through an indictment. Indictments, by definition, require the signature of an attorney for the government. FED. R. CRIM. P. 7(c)(1). This means that, without the participation of a government attorney, the grand jury would be statutorily limited to a purely investigatory purpose, since it could not return either a presentment or an indictment.

While grand juries serve a vital investigatory function within the federal system, there is no authority for grand juries to conduct an "investigation for its own sake." Id. at 900. Although the federal rules do not specifically forbid purely investigatory grand juries that investigate but cannot indict, the Third Circuit has found "nothing in [FED. R. CRIM. P.] Rule 6(a) which can be fairly construed to authorize them." Id. at 900. A grand jury's investigatory power, therefore, is tied to their ability to culminate in a disposition of whether or not to accuse a suspect of a crime. Id.

This leaves no statutory authority for a federal grand jury to hear information from the Petitioners that is presented "autonomously and independently" (Pl. Br. at 1) of the United States Attorney's Office. Without the support of a government attorney, a grand jury's investigation would extend beyond the statutory scope of its investigatory powers since there would be no means for it to culminate in "a disposition that furthers the prosecutorial process."

Christian, 660 F.2d at 900. This leaves no statutory authority to allow individuals, such as the Petitioners, to bypass the governmental prosecutorial authorities in order to directly and independently present criminal charges and allegations to a federal grand jury. Accordingly, the Petitioners' request to present directly to a federal grand jury is DENIED.

III. CONCLUSION

The Court appreciates what appears to be a good faith effort by the Petitioners to assist in the investigation and prosecution of public corruption allegations. While public corruption must be vigorously investigated and, where violations of the law are found, actively prosecuted, the means being sought by the Petitioners to accomplish this goal are contrary to the constitutional and statutory authority that governs the operation of federal grand juries. For the reasons stated above, and for good cause shown, the Petitioners' motion is DENIED. An appropriate form of order will be filed herewith.

Date: January 3, 2006
Stanley R. Chesler, U.S.D.J.

Footnotes

[1]The specific section of the Advisory Committee Notes at issue states that "presentment is not included as an additional type of formal accusation, since presentments as a method of instituting prosecutions are obsolete, at least as concerns the Federal courts." FED. R. CRIM. P. 7(a), adv. comm. note 4.

[2] The presentment played an important role in the historical functions of the grand jury:

> Presentments played a major role in pre-Revolutionary America, and continued to be important for the first half of the nineteenth century. During this period, state and federal grand juries investigated not only criminal activity, but also matters of public concern such as the state of local services and the possibility of corruption among public servants. As one author notes, they performed many functions that are now carried out by civil servants and administrative agencies.
>
> Grand juries that discovered criminal conduct could return charges, either by way of an indictment or a presentment, but those inquiring into noncriminal misconduct had to find some other way of acting on what they discovered. They developed the practice of issuing reports, which for some reason became known as "presentments." Unlike the common law presentment, which was a statement of criminal charges, these presentments levelled no charges and, indeed, often concerned matters having nothing to do with criminal conduct. Colonial grand juries, for example, issued presentments that were concerned with matters as diverse as maintaining street lamps, bridge repair and the state of public morality. After the Revolution, grand juries actively monitored civic affairs, especially the conduct of public officials.

SUSAN W. BRENNER, GREGORY G. LOCKHART, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE, §3.3

[3]Granting individuals direct access to grand juries can run a substantial risk of undermining the very rights of the accused that the Fifth Amendment is designed to protect. As the New Jersey Supreme Court recently noted:

> [G] iving private persons the right of direct access to the grand jury would be fraught with abuse. Permitting prosecutorial bypass might encourage some persons not to bring pertinent information promptly to law enforcement authorities in the hope of gaining direct contact with the grand jury. In some cases, a private person might be bent on pursuing an ill-motive or vindictive agenda. . . . For instance, political candidates, on the eve of an election, might charge their opponents with fraud or some other nefarious activity and request admission to the grand jury.

In the Matter of the Grand Jury Appearance by Larry S. Loigman, Esq,183 N.J. 133,145 (2005). Giving individuals direct access to the grand jury and removing the governmental prosecuting authorities from the process would undermine the prosecutor's screening authority and almost certainly "increase the likelihood that wrongful indictments would be returned," thereby undermining the very rights of the accused that the Fifth Amendment seeks to protect. Id. at 147. See also In re: New Haven Grand Jury, 604 F.Supp. 453, 460 (D.Conn.1985) ("[A] rule that would

afford the general public unsupervised access to the grand jury is a rule calculated to empower the mischievous and the criminal and injure the innocent.")

[4] Unlike indictments, presentments pose unique risks to the rights of the accused. A presentment has the force of a judicial document but, unlike an indictment, lacks "the right to answer and to appeal." In re: Grand Jury Proceedings, Special Grand Jury, 813 F. Supp. 1451, 1462 (D.Colo. 1992) (citations omitted). A presentment "accuses, but furnishes no forum for denial." Id. "An indictment may be challenged-even defeated[, but t]he presentment is immune." Id.

RELEVANT PROVISIONS INVOLVED

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in

suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Federal Rules of Criminal Procedure (2006)

III. THE GRAND JURY, THE INDICTMENT, AND THE INFORMATION

Rule 7. The Indictment and the Information

(a) When Used.

(1) ***Felony.***

An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable:

(A) by death; or

(B) by imprisonment for more than one year.

(2) ***Misdemeanor.***

An offense punishable by imprisonment for one year or less may be prosecuted in accordance with Rule 58(b)(1).

FED. R. CRIM. P. 7 (a) adv. comm. note 4; *see* CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 121, at 338 (1982).

"Presentment is not included as an additional type of formal accusation, since presentments as a method of instituting prosecutions are obsolete, at least as concerns the Federal courts."